

(2018) 05 DEL CK 0261
In the Delhi High Court
Case No : O.M.P. 224 OF 2015

M/S TRIVENI GLASS LTD.

APPELLANT

Vs

M/S GAIL (INDIA) LTD

RESPONDENT

Date of Decision : 21-05-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Code Of Civil Procedure, 1908 — Order 11 Rule 12

Citation : (2018) 05 DEL CK 0261

Hon'ble Judges : AYANT NATH

Bench : Single Bench

Advocate : Dayan Krishnan, Amit Jain, Aakash Lodha, Ginny Rautray, Sanjeev Seshadri, Gourab Banerji, Kaushik Laik, Syed A.Haseeb, Sahil Tagotra

Final Decision : Dismissed

Judgement

JAYANT NATH, J.

Â 1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to impugn the Award dated 29.09.2014 passed by the

learned Arbitrator.

2. The petitioner owns and operates a Glass Plant at Kondagudem, Dwarapalli Mandal, West Godavari District, Andhra Pradesh. It sources gas for its

various industrial applications to manufacture different types of glass. The respondent is a Government company which has a right to procure and sell

the gas from its existing sources of ONGC, Tapti, Panna-Mukta and Ravva areas and owns and operates pipeline network.

3. The petitioner entered into a Gas Sales and Transmission Agreement (GSTA) dated 30.12.2010 with the respondent for supply of gas to its

aforesaid plant. The respondent agreed to sell, transport and deliver gas at the

delivery point in the said plant. The petitioner was to obtain 30,000 SCM of gas on the stated terms and conditions. Clause 5.6 of the Agreement provided that the terms and conditions would be spelt out in the side letter as Appendix 1 for charges for overdrawal of gas.

4. Issue pertains to the overdrawal of gas during the period commencing from first fortnight of January 2012 to second fortnight of July 2013. It is the case of the petitioner that the petitioner has been wrongly and illegally burdened with the excess payment of Rs.10,02,02,905/-. The case of the petitioner further is that the basis for installing the plant by the petitioner at Rajamundhry was availability of continuous supply of natural gas in the K.G. Basin. The respondent under Article 5.1(a) of the agreement had agreed to deliver gas at the delivery point of the petitioner up to a maximum of Daily Contracted Quantity (DNQ) of 30,000 Standard Cubic Meteres (SCM) per day on firm basis subject to availability of gas. However, it is contended that the respondent never supplied the said allocated amount of 30,000 SCM Gas per day. On account of the same, the petitioner had no option but to resort to overdrawal of the gas. As per Appendix 1, the petitioner had to be charged at 120% of the highest priced gas in the pipeline for the overdrawal quantity of the gas in excess of the aggregate DNQ. The grievance of the petitioner is that they have been charged for RLNG gas price for the said excessive drawal which is totally illegal as there was no RLNG gas physically available in the KG Basin pipeline.

5. In view of the disputes that arose between the parties, the petitioner invoked the arbitration clause.

6. The learned Arbitrator framed the following issues:-

â??(i) Whether in the facts and circumstances of the case, the Claimant is entitled to an award of Rs. 10,12,02,905.00 on the ground that the Respondent was not entitled to charge for the gas supplied to the Claimant industry on the basis of RLNG pricing?

(ii) Whether the Respondent was entitled to charge the Claimant at the non-regulated rate?

(iii) Whether the Claimant is entitled to interest on the amount of claim and if so, at what rate?â??

Â 7. Parties led their evidence. The petitioner led the evidence of Sh.RK.Sinha-CW1, Sh.A.Chaterjee-CW2 and Sh.A.K. Dhawan-CW3. The

respondent examined Sh.A.K.Sahni RW-1. Some of the salient conclusions of the learned Arbitrator in the award are as follows:- The petitioner failed to install dual fuel capability in its plant despite being aware about the necessity for the same. In view thereof, the petitioner depended wholly on overdrawal of gas. The petitioner was on all material times fully aware that it had taken a conscious business decision to overdraw gas and was fully aware of the consequences. It is also aware that supply of gas at RLNG price was also available. The learned Arbitrator also concluded that the term "highest price" does not connote the physical availability of highest price gas in the KG Basin pipeline. He also noted that RLNG price was being charged from independent power plants. Further records also show that two small scale industries were receiving gas at RLNG price. Hence, for the purpose of pricing, the gas was available in the system. The learned Arbitrator concluded that if the petitioner has undertaken to pay 120% of the RLNG price on the overdrawal of gas, then it is bound by the same. It also concluded that such provision in the contract is beneficial to all gas consumers as it has a deterrent effect. He further concluded that there is sufficient material on record to show that for the purpose of pricing RLNG gas was available in the pipeline of the respondent. The claim of the petitioner was dismissed.

8. I have heard learned counsel for the parties.

9. Mr.Dayan Krishnan, learned senior counsel appearing for the petitioner contended as follows:-

(i) The Phrase "highest price gas in the pipeline system" as used in Appendix 1 of the agreement between the parties refers to the highest price

of gas physically available in the pipeline of the respondent in Rajamundhry. The respondent cannot equate this to the highest priced gas sold by the respondent. Such charging made by the respondent was wholly illegal and contrary to the agreement.

(ii) RLNG gas was not physically available in the KG Basin. Findings of the learned Arbitrator to the said effect are wholly illegal and contrary to the admitted facts. RW1-A.K.Sahni admits that RLNG gas was not physically available in the GAIL Pipeline System. He has said so in his affidavit by way of evidence and cross-examination. Hence, the question of charging the petitioner at the rate of RLNG gas price did not arise.

(iii) The admitted fact is that when a customer contracts for a gas from a particular source and if the gas is supplied from another particular source, it is termed as "Swapping arrangement". It is pleaded that there was no contract between the parties for supply of RLNG gas by means of swapping arrangement and hence, there was no question of charging the petitioner at the RLNG gas rates for the excessive drawal.

10. Mr. Gourab Banerji, learned senior counsel appearing for the respondent has denied the contentions of the petitioner. He has reiterated that the learned Arbitrator has on the appreciation of evidence recorded the finding that the highest price gas in the pipeline system would mean highest gas supplied to a customer and not the source of the gas. As admittedly in the KG basin area independent power plants and small consumers were paying RLNG price for the gas supplied to them, the same would be applied to the petitioner. It is not necessary that a particular gas must be physically present in the system. Learned Arbitrator accepted the factual evidence that the composition of the gas irrespective of the source is the same, namely, hydrocarbon. The view taken by the learned Arbitrator is a plausible view based on the appreciation of evidence and hence, there is no merit in the present petition.

11. Clause 5.6 of the Agreement between the parties states as follows:- "5.6 Overdrawl Gas

It shall be governed by the terms and conditions as spelled out in side letter enclosed as Appendix 1 to this Agreement."

12. Appendix 1 of the agreement reads as follows:- "In this regard, it may please be noted that w.e.f. 01.07.09, the methodology for levy of over drawl charges shall be as follows:

On Daily Basis

"If Overdrawal (quantities drawn in excess of aggregate DNQs under all GSAs with GAIL is within the tolerance of 6% of aggregate DNQs under all GSAs with GAIL, the same shall be treated as Authorized Overdrawal.

"If Overdrawal (quantities drawn in excess of aggregate DNQs under all GSAs with GAIL) is beyond the tolerance of 6% of aggregate DNQs under all GSAs with GAIL, the entire Over drawl quantities in excess of the aforesaid aggregate DNQs shall be considered as Unauthorised

Overdrawal to be charged at 120% of the highest priced gas in the pipeline

system.

Day(s) during which Overdrawal beyond 6% of the aforesaid aggregate DNQs has taken place shall be excluded from the relevant fortnight and

remaining day(s) shall be aggregated for calculating the aggregate Overdrawal of that fortnight.

Authorised Overdrawals to be reconciled over the relevant fortnight. On Fortnightly basis If the Authorized Overdrawal for each day, after

adjusting under draws in the same priority as mutually agreed in allocation methodology for the days, if any, (excluding those days on which entire

Overdrawal quantities have been booked as Unauthorized Overdrawal) aggregated over the relevant fortnight is beyond 6% of the DNQ of the last

day of the fortnight, the same shall be treated as drawl of the highest priced gas as per the respective GSAs with GAIL for which nominations have

been made in the relevant fortnight. If the Authorised Overdrawals for each day, after adjusting under draws in the same priority as mutually agreed

in allocation methodology for the days, if any, (excluding those days on which entire Overdrawal quantities have been booked as Unauthorized Over

drawl) aggregated over the relevant fortnight is beyond 6% of the DNQ of the last day of the fortnight, such Overdrawal quantities shall be

considered as Fortnightly Unauthorized Overdrawal to be charged at 120% of the highest priced gas in the pipeline system.

13. The entire dispute centers around interpretation of the phrase "120% of the highest priced gas in the pipeline system". The case of the

petitioner is that the respondent have wrongly taken the price of Regasified Liquid Natural Gas (RLNG) whereas no such gas is at all available in the

system of the respondent in KG Basin. The learned Arbitrator based on the evidence on record made the following conclusions:- "It, however,

appears from the deposition of Mr. Dhawan (CW3) that no such facility was installed in the plant of the Claimant. This clearly goes to show that the

Claimant despite being fully aware about the necessity of having a dual-fuel capability for smooth running of the factory failed and/or neglected to do

so and depended only on overdrawl of gas. In fact, it has clearly been stated on behalf of the Claimant that it had no other alternative, but to overdraw

gas.

9.17. The conduct of the parties, it is well settled, is a guide to show as to how

the parties have understood the terms thereof. In this case, from its conduct, it is apparent that the Claimant at all material time was aware that it had taken a conscious business decision to overdraw gas and was fully aware of the consequences thereof. It was also aware that supply of gas at RLNG price was also available.

9.22 It is therefore, not correct to contend that the term "highest price" connotes the physical availability of highest price gas in the K.G. basin

pipeline system. It has been admitted by the Claimant that RLNG price was being charged from the independent power plants and thus, admittedly, for

the purpose of pricing the said gas was available in the system. The Respondent furthermore has brought on record documents to show that even two

small scale industries were receiving the gas at RLNG price. xxx

9.37 (q) Article 5.6 and Appendix 1, having clearly provided for the charges in respect of overdrawal of gas, which being in the nature of deterrence,

there was no reason whatsoever as to why the same was not to be given effect to. For the aforementioned purpose, physical availability of RLNG gas

was not necessary as all categories of the gases are of same composition. It is incorrect to contend that the Respondent could not charge at a non-

APM price.

r) A distinction must be made between the terms "cost" and "price", and in that view of the matter the Claimant is not concerned with the

price of gas which GAIL were to pay the producers (the cost), and what the consumer are required to pay to GAIL (the price). The terms

"highest price gas" would mean "highest price gas being supplied". It is a matter of record that highest price gas was available in the system

by reason of supply thereof to the other customers in the K.G. Basin. For the aforementioned purpose, the source is irrelevant and what is relevant is

the price.

s) The source of the gas is not of much relevance in as much as, stated by Mr. Sahni, composition of gas being "hydrocarbon" remains the

same.

14. What has been pleaded before this court is that there was no RLNG gas in the system and the learned Arbitrator has wrongly concluded that such

gas was there in the system. Reliance was placed on the evidence of RW-1. A reference may be made to the affidavit by way of evidence of

Sh.A.K.Sahni RW-1 who is the General Manager (Pricing) of the respondent. In para 10 of his affidavit, he states as follows:-

10. The Respondent has periodically been informing the highest price of gas by the end of first week of every month to all its customers and the

Claimant has been paying the over-drawl charges on that basis since 2006. The charges were on the very same basis except that RLNG was not

flowing in the GAIL system. The parties were ad idem and very clear that the term the highest price gas in the system was the highest price of the

gas being sold/to be sold by the Respondent. The parties to the Contract had expressly agreed to this highest price so that one of the customers does

not excessively overdraw and affect the supplies to the other customers and thereby the grid discipline is maintained.

15. Similarly in his cross-examination, he states as follows:-

Q.41 Is it correct that RLNG was not flowing in the GAIL system at Rajamundhry? Ans. Gas was sold in the Rajamundhry pipeline system by

way of swapping arrangement. Customers were paying the RLNG price.

Q.42 I put it to you that it is to your knowledge and which you confirm also in para 10 of your affidavit of evidence that RLNG was not in the GAIL

system and hence you are avoiding to give this factual status. What do you have to say? Ans. I agree and have to say that physical flow is not

relevant in the swapping arrangement and the customers on the pipeline system are invoiced in terms of the contract for supply of the nominated

quantity and the overdrawl, if any, in terms of the pricing mechanism informed to the customers under the contract. xxx

Q.56 Are you suggesting that without RLNG being physically flowing through the pipe system of GAIL at Rajamundhry, you imposed 120% penalty

on the basis of price of RLNG for overdrawl for purposes of ensuring the customers do not overdraw? Ans. Yes.

Q63 I put it to you that phrase "highest priced gas in the pipeline" pertains to the availability of physically available gas in the pipeline at

Rajamundhry. What do you have to say? Ans. No, it means that highest priced gas sold to the customers in the pipeline systems.

16. Reference may also be had to the response of the respondent to the interrogations filed by the petitioner. The petitioner had filed interrogatories

under Order 11 Rule 12 of CPC. Some of the replies are relevant, which reads as

follows: Re.Q.No.1 Gas at RLNG prices was physically available in the KG Basin pipeline through the modus of a swapping arrangement as directed by the Ministry of Petroleum and Natural Gas (MOPNG) to be supplied inter alia to independent Power Producers like GVK Gautami Power Ltd. and GMR Vemagiri Power Generation Ltd. and small consumers during the period 01.01.2012 to 31.07.2013. Invoices for some of the purchases are attached from Pg. 54 to 58 of the additional documents filed by the respondent. According to Gas specification parameters the RLNG and Domestic gas are identical and the only difference is in the price of the said gases. Re.Q.No.4 There are numerous agreements with the consumers of gas at RLNG prices a few of them are on record in the documents filed by the Respondent wherein the prices have also been indicated. There were also several monthly contracts for the supply of gas at RLNG prices. Some of the invoices have also been filed by the Respondent for such transactions. Such prices have been communicated by the respondent on a monthly basis by email communication copies of which have been attached in the Additional documents.

Â 17. Another aspect to be noted is the position prior to 2011 or post 2013. The learned arbitrator noted that such charges have been made prior to 2011 and have not been disputed by the petitioner. However, after 2013 RLNG gas was not imported and such charges have not been made. The learned arbitrator had noted as follows:

9.38. The Claimant urges that there is no reason as to why RLNG rates were not applied prior to 2011 or post 2013. The fact that at least in 2011, such charges were made is not in dispute. The claimant itself has not questioned the said levy before this Tribunal. In that view of the matter, the principle of estoppel is clearly attracted against the Claimant. Sufficient materials have been brought on record to show that as after 2013, RLNG gas was not imported, no such charges were made.

Â 18. A perusal of the aforesaid evidence would show that RLNG gas was not physically flowing through the pipe system of GAIL. But consumers were being charged at RLNG gas rate in view of swapping arrangement.

19. The learned Arbitrator based on above concluded that it would not be correct to contend that highest price connotes physical availability of the highest price gas in KG basin pipeline system. The facts on record which have

been even admitted by the petitioner are that RLNG price was being charged from the independent power plants and also two small scale industries who were paying at RLNG gas price. The relevant price is the highest price charged from customers by the respondent. Hence, the relevant price for charging the petitioner was the price of RLNG.

20. Keeping in view the aforementioned facts, it is manifest that the view taken by the learned Arbitrator is a plausible view. The findings of fact are that

there were number of consumers who were being charged on RLNG Gas rates. The petitioner has been charged as per the said rates in terms of

Appendix I to the agreement. Merely because RLNG Gas was not physically present in the system would make no difference inasmuch as the

physical quality of the said gas are Hydro-Carbon.

21. Interpretation of an agreement is within the domain of the arbitrator. Reference in this context may be had to the judgment of the Supreme Court

in D.D.Sharma v. Union of India, (2004) 5 SCC 325, where the court held as follows:

“24. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a

contract. Interpretation of a contract is a matter for the arbitrator to determine, even it gives rise to determination of a question of law.

“ 22. Reference may also be had to the judgment of the Supreme Court in the case of McDermott International Inc. vs. Burn Standard Co. Ltd. and

Ors., 2006 (11) SCC 181/(MANU/SC/8177/2006), wherein the court held as follows:

“72. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of

construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature,

scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into

consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for

the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of

a question of law. [See Pure Helium India (P) Ltd. v. Oil & Natural Gas

Commission MANU/SC/0803/2003: AIR2003SC4519 and D.D. Sharma v.

Union of India MANU/SC/0419/2004: (2004)5SCC325]. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised

and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.â??

Â 23. There is no merit in the plea of the petitioner. The petition is dismissed.